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In the Supreme Court of the United States

OCTOBER TERM, 1978

STEVEN F. ETHIER, PETITIONER

v.

UNITED STATES POSTAL SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

WADE H. McCREE, JR.
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Petitioner was discharged from employment by the United States Postal Service because of his improper performance of his duty as a letter carrier. He sought the aid of his union representative in contesting the discharge. The union prosecuted petitioner's case through arbitration, but the arbitrator dismissed it, referring to petitioner's failure timely to discuss his grievance with his supervisor as required under the arbitrator's interpretation of the collective bargaining agreement. Petitioner then brought suit in federal court against the Postal Service, alleging that it had breached the collective bargaining agreement by discharging him without good cause, and against the union, alleging that it had breached its duty of fair representation in its handling of the grievance.

The district court granted the motions of the union and the Postal Service for summary judgment and dismissal without rendering an opinion. The court of appeals affirmed (590 F. 2d 733; Pet. App. A-1 to A-9), rejecting petitioner's contention that the union's conduct was "so perfunctory that it was arbitrary, discriminatory, or in bad faith" (Pet. App. A-5). The court found that the allegations in the complaint and supporting affidavits established that the union steward "pursued the grievance with vigor and erred only in failing to anticipate how the Agreement would ultimately be construed by an arbitrator" (*id.* at A-8). The court further found the union's error to be "understandable in the light of the specific language of the Agreement" (*id.* at A-7).[1]

Petitioner contends that the union breached its duty of fair representation because it failed to take a procedural step prior to arbitration that it reasonably believed was not required.[2] The court of appeals correctly rejected that contention in light of this Court's decisions delineating the duty of fair representation.

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[1]The collective bargaining agreement provided that the employee "must discuss a grievance with his immediate supervisor within fourteen (14) days of when the employee or Union had learned or may reasonably have been expected to have learned of its cause" (Pet. App. A-2). The union steward, who was new, discussed the grievance with various Postal Service representatives on seven different occasions before the written grievance was filed and believed that those efforts satisfied the requirement of the agreement (*id.* at A-3).

[2]Unless the union breached its duty of fair representation, the grievance arbitration proceeding under the collective bargaining agreement is final and binding, and no suit to enforce the agreement lies against the employer. *Vaca* v. *Sipes*, 386 U.S. 171, 186 (1967); *Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554, 563 (1976).

Vaca v. *Sipes*, 386 U.S. 171 (1967), established that a breach of the duty of fair representation can arise from union conduct that is "arbitrary, discriminatory, or in bad faith" (*id.* at 190). The Court gave as an example of conduct that would amount to a breach of duty "arbitrarily ignor[ing] a meritorious grievance or process-ing] it in [a] perfunctory fashion" (*id.* at 191). This Court has also established, however, that an employee must allege more than a mistake in judgment on the part of the union. See *Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554, 571 (1976), which noted that proof of a breach of fair representation requires "more than demonstrating mere errors in judgment." The Court emphasized that "[t]he grievance process cannot be expected to be error-free." *Ibid.*[3] In this case petitioner has shown no more than a mistaken judgment by the union about what the agreement required.[4]

Petitioner nonetheless contends that the Eighth Circuit's approach to the issue of perfunctory conduct differs from that of the Sixth Circuit. The words used by the courts to describe their tests are different, but it is not

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[3]See also *De Arroyo* v. *Sindicato de Trabajadores*, 425 F. 2d 281, 284 (1st Cir. 1970); *Bazarte* v. *United Transportation Union*, 429 F. 2d 868, 872 (3d Cir. 1970); *Coe* v. *United Rubber, Cork, Linoleum & Plastic Workers*, 571 F. 2d 1349, 1350-1351 (5th Cir. 1978); *Baldini* v. *Local 1095, United Auto Workers*, 581 F. 2d 145, 151 (7th Cir. 1978); *Robesky* v. *Qantas Empire Airways Ltd.*, 573 F. 2d 1082, 1089-1090 (9th Cir. 1978).

[4]Petitioner's arguments also could be taken as an attack on the arbitrator's decision. Petitioner apparently reasons: if the arbitrator was right, then the union did not represent me properly; if the union represented me properly, then the arbitrator was wrong; either way, I am entitled to relief. This approach, if followed, would lead to abandonment of the finality ordinarily accorded to arbitral decisions.

clear that they lead to different results. The facts in the Sixth Circuit cases relied on by petitioner are quite unlike those presented here. In *Milstead* v. *International Brotherhood of Teamsters*, 580 F. 2d 232 (6th Cir. 1978), the court found that the union was negligent in failing to learn of the applicability of a contractual provision that governed the employee's grievance. Here, in contrast, the union made a good faith effort to act in a manner that it believed was in compliance with the relevant contractual provision. Similarly, in *Ruzicka* v. *General Motors Corp.*, 523 F. 2d 306 (6th Cir. 1975), clarified on rehearing, 528 F. 2d 912, the court found a failure to process a grievance in timely fashion to be "unexplained union inaction, amounting to arbitrary treatment" (528 F. 2d at 913). Here, on the other hand, the union's conduct was fully explained and had none of the indicia of arbitrary action. There is no suggestion in any Sixth Circuit opinion that a union's reasonable but erroneous interpretation of a contractual provision is a breach of duty, and there is thus no reason to believe that the Sixth Circuit would have decided this case in petitioner's favor. Resolution of the difference between the approaches of the court of appeals—if there is one—should await a case where the difference affects the disposition.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. McCREE, JR.
Solicitor General

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